

Digital Commons
@ LMU and LLS

Loyola Marymount University and Loyola Law School
**Digital Commons at Loyola Marymount
University and Loyola Law School**

Loyola of Los Angeles International and
Comparative Law Review

Law Reviews

3-1-1998

The High Cost of Dying in Russia

Dominic J. Messiha

Recommended Citation

Dominic J. Messiha, *The High Cost of Dying in Russia*, 20 Loy. L.A. Int'l & Comp. L. Rev. 569 (1998).
Available at: <http://digitalcommons.lmu.edu/ilr/vol20/iss3/7>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

THE HIGH COST OF DYING IN RUSSIA

I. INTRODUCTION

Life is dangerous in Russia. Only fifty-four percent of Russians now sixteen years old will live to be sixty, a rate worse than in 1897.¹ Not only are accidents the second leading cause of death, but a 1995 Russian Government study revealed that a Russian is five times more likely to die in an accident than an American.² Each year, deaths outnumber births by 600,000, and the average man's life expectancy is only fifty-nine years.³

Prior to 1994, Russian survivors could not recover lost wages when victims were negligently killed.⁴ Survivors could only recover damages resulting directly from death, such as burial and funeral expenses.⁵

In an attempt to liberalize damage awards, the Russian *Duma*⁶ amended its wrongful death statute in 1996 to allow survivors to recover the decedent's lost wages.⁷ This law, because of its

1. See Richard C. Paddock, *A Russian Ambulance is Seldom Chased*, L.A. TIMES, June 17, 1997, at A1.

2. See *id.*

3. See *id.*

4. See Resolution of the Plenary Session of the Supreme Court of the Russian Federation No. 3 of April 28, 1994 on the Judicial Practice in Cases of Compensation for the Damage Inflicted by Injury to Health, translated in ECONOMIC LAW OF RUSSIA (Garant 1997 Doc. 10001178), available in LEXIS Intlaw Library, RF Law File [hereinafter Russian Resolution No. 3]. A common point of view in Russia is to accept accidents as fate and not to try and rationalize a cause for the accident. See Paddock, *supra* note 1, at A9. "In Russia, an average person would not think of suing . . . It's your own fault [if there is an accident]." *Id.*

5. A statute enacted by the Russian *Duma* in 1994 was the first to provide for damages other than burial expenses, including a provision for lost future wages when the breadwinner of a family is killed. See GRAZHDANSKII KODEKS RF [GK RF] ch. 40, art. 459 (Russ.), translated in Economic Law of Russia (Garant 1997 Doc. 10080200), available in Westlaw; see also Paddock, *supra* note 1. In the case of Lyudmila Rolshchikova, the attorney believed that Rolshchikova's 22 year old daughter would be fortunate to merely recover these costs, because she is beyond the age of dependence. See *id.*; see also KONSTITUTSIIA RF [Constitution] [KONST. RF] art. 11, § 1 (1993) (Russ.).

6. The Duma is the Russian Federation Parliament. See KONST. RF art. 11, § 1 (1993).

7. See Russian Resolution No. 3, available in LEXIS Intlaw Library, RF Law File. The wrongful death action is contained within a body of laws which is generally concerned with work-related injuries, but there is also a provision for damages when the victim does

narrow scope, has not motivated the Russian industry to implement safety measures and prevent needless deaths.⁸ With a few narrow exceptions, only dependent family members are allowed to recover lost wages.⁹ As a result, tortfeasors only compensate survivors who have no other means of support.¹⁰

This Comment considers damages under the Russian wrongful death statute and recommends the extension of lost wage recovery to all survivors, regardless of their dependency status. In this way, Russian compensatory damages would be comparable to the U.S. system.¹¹ Russia should not, however, adopt a U.S.-style punitive damage system in wrongful death actions. Punitive damages are not needed to deter negligent behavior in Russia, and their impact on the Russian economy would be severe.

Part II briefly describes the Russian legal system and explains why reform is difficult. Part III discusses the 1996 Amendment to the Russian wrongful death statute and the possible objectives behind it. Part IV discusses the policy considerations supporting tort reform in Russia and how this Comment's proposed damage system would rectify existing problems. Part V gives a brief overview of the U.S. system of damage allotments in wrongful death actions, while Part VI recommends that Russia adopt a U.S.-style lost wage provision to compensate all survivors.

II. AN OVERVIEW OF THE RUSSIAN LEGAL SYSTEM

A. Judges and Lawyers in Russia

There is little financial incentive in Russia for either judges or lawyers to improve the legal system.¹² Judges are underpaid,¹³

not maintain a work relationship with the defendant-tortfeasor. *See id.* The Russian Resolution of April 28, 1994 was amended in 1996 to include damages to children who attained the age of majority but were still pursuing their education. *See* GK RF ch. 40, art. 459, §1. Prior to this amendment, the 1994 statute only allowed recovery of lost future wages when the decedent was killed on the job. *See* Russian Resolution No. 3, *supra* note 4.

8. *See* Paddock, *supra* note 1, at A9.

9. The survivors must also be elderly, disabled or under eighteen to recover. *See* GK RF ch. 40, art. 459, § 1.

10. *See id.*

11. *See generally* 22A AM. JUR. 2D Death §§ 255-63 (1988).

12. *See generally* William Patrick Murphy, Jr., *The Russian Courts of General Jurisdiction: In Crisis, Undergoing Reform, or Both?* (1997) (unpublished manuscript, on file with the *Loyola of Los Angeles International and Comparative Law Journal*). Neither judges nor lawyers are paid sufficiently in Russia. *See* Paddock, *supra* note 1, at A9.

earning only between \$1800 and \$2800 (U.S.) per year. Federal judges are the highest paid, while the municipal judges who usually decide tort cases are not only the lowest paid but also carry the heaviest case loads.¹⁴

Lawyers are also undercompensated.¹⁵ The highest paid attorneys work in international business development within Russia.¹⁶ Lawyers do not use the contingent fee system in Russia because damage awards are typically too small to cover legal fees even without subtracting the contingency fee.¹⁷ Partly due to these low damage awards, there are only 26,000 lawyers in Russia,¹⁸ about two-thirds the number currently practicing in Los Angeles County alone.¹⁹

This lack of financial incentive draws the most gifted lawyers

Judges frequently go without pay during government shutdowns. See Murphy *supra*, at 3. Lawyers cannot capitalize on fees because in present economic conditions, few Russians can afford lawyers. In addition, contingent fees are impractical because damage awards are typically low. See Paddock, *supra* note 1, at A9. Although other incentives exist for improving the legal system, Russian lawyers first need financial stability to establish practices and effectively serve clients. See *id.*

13. See Murphy, *supra* note 12, at 3. The judicial salary figures can be misleading because Russian judges also receive housing and other benefits in addition to merit increases. The salaries remain comparatively low, however, and lawsuits filed for the payment of wages more than tripled in 1996. See *id.* Russian President Boris Yeltsin enacted a presidential decree on January 25, 1997, that would increase judicial salaries by 65%, but Russia's current economic crisis raises serious doubts whether the decree can be implemented in the near future. See *id.* It does not seem possible that judges can receive such a significant pay raise when the government cannot afford to pay the present meager salaries. See *id.*

14. See Murphy, *supra* note 12, at 3. Caseloads have decreased by about five percent, however. See *id.* This does not reflect a reduction in tort cases but rather results from fewer divorces, bankruptcies, and housing disputes. See *id.*

15. See *id.*

16. See *id.* International business lawyers receive the highest salaries in Russia because they are retained mostly by foreign corporations who can afford to pay larger retainers in exchange for the opportunity to do business in Russia. This arrangement may reflect the domestic industry's inability to successfully tap the market's potential. See Merton J. Peck, *Russian Privatization: What Basis Does it Provide for a Market Economy?*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 21, 27 (1995).

17. As a result, plaintiffs cannot afford legal fees. Furthermore, difficult ethical dilemmas arise from charging contingency fees when plaintiffs already receive insufficient awards.

18. See Paddock, *supra* note 1, at A9. The number of lawyers in Russia is low because there are not enough clients who can afford to pay attorney fees, and the likelihood of success for tort plaintiffs is low. See *id.*

19. See *id.* In comparison, the United States has nearly a million lawyers, more than 38 times as many as Russia. See *id.*

away from the courtroom and into transactional law.²⁰ As a result, legal reform is slow because cases that reach litigation are often tried by inexperienced or less skilled attorneys who are less likely to argue effectively for changes in the law.²¹ Moreover, the most talented attorneys have no financial incentive to become judges because of the low pay.²²

B. The Russian Judicial System

The Russian judicial system consists of four distinct levels of courts.²³ The Courts of General Jurisdiction ordinarily decide tort cases and are roughly equivalent to U.S. municipal courts.²⁴ There is also a military court, a commercial court, and a constitutional court.²⁵

C. Legal Research in Russia is Difficult and Time-Consuming

A major impediment to justice in Russia is that many statutes, including those establishing negligence causes of action, are extremely difficult to find.²⁶ The tools that U.S. lawyers typically use to find legal materials, such as computer databases and legal texts are not available in Russia.²⁷

Russian laws prior to 1994 are not codified and are stored only in central urban locations.²⁸ Russian laws are ostensibly available to the public,²⁹ but even experienced lawyers have difficulty finding applicable statutes, while persons without legal training are at a great disadvantage.³⁰

20. See Murphy, *supra* note 12, at 4.

21. See Paddock, *supra* note 1, at A9. In the case of Lyudmila Rolshchikova, who was crushed by falling ice, the matter was researched and tried by a law student named Tatiana Dmitriyeva. See *id.* Although Dmitriyeva was not incompetent, she may have lacked the necessary experience to represent her client most effectively. See *id.* Presumably, the plaintiff did not have the means to hire an experienced lawyer, or could not find one to take the case. See *id.*

22. See Murphy, *supra* note 12, at 3.

23. See *id.* at 3.

24. See *id.*

25. See *id.*

26. See Paddock, *supra* note 1, at A9. Only the most recent codes to take effect since the collapse of the Soviet Empire are codified. See generally GK RF (Russ.).

27. See Paddock, *supra* note 1, at A9.

28. See *id.* The Russian Constitution does require statutes to be published, however. See KONST. RF ch. 1, art. 15(3), § 1 (1993).

29. See KONST. RF ch. 1, art. 15(3), § 1 (1993).

30. See Paddock, *supra* note 1.

The lack of accessibility impedes the litigation process by deterring those who wish to enforce their legal rights. It also increases attorney fees because of the inordinate time spent researching.³¹

The case of Lyudmila Rolshchikova, a single mother of two who was killed by a desktop-sized sheet of ice that slid off a building, illustrates the inefficiency of the Russian legal system.³² A second-year law student represented her children in the wrongful death action against the government.³³ It took the student four months to locate the negligence statute in the municipal archive, which provided that the failure of government maintenance workers to remove ice from buildings constitutes negligence.³⁴ The childrens' case is still pending at this time.³⁵

III. THE 1996 AMENDMENTS TO THE RUSSIAN WRONGFUL DEATH STATUTE

The Constitution of the Russian Federation articulates the policy considerations on which the Russian tort system is based.³⁶ Primarily, the tort system should compensate negligence victims and their survivors.³⁷ It should also discourage future negligence by punishing tortfeasors financially, thereby providing financial incentives to improve existing technology.³⁸ Judgments against de-

31. Considered with other factors described earlier, such as the lack of a contingent fee system, one can appreciate that litigation in Russia is extremely difficult.

32. See Paddock, *supra* note 1, at A9. These types of situations are not uncommon in Russia given the harsh winters. See *id.*

33. See *id.*

34. Even a finding of liability does not guarantee a substantial damage award in a wrongful death case. See *id.* Also, in Russia as in the United States, a finding of criminal liability strengthens a plaintiff's case in a subsequent civil action. In the past, however, a finding of criminal liability was a prerequisite for civil liability under the Soviet System. The remnants of this system still linger in Russia, and a civil case is often preceded by a criminal case. In the action of Lyudmila Rolshchikova there were no criminal charges filed against the defendants, making the case more difficult to prove. See *id.*

35. See Paddock, *supra* note 1, at A9.

36. The Russian Constitution provides that "[t]he rights of persons who have sustained harm from crimes and abuses of power shall be protected by the law. The state shall guarantee the victims access to justice and compensation for damage." KONST. RF ch. 2, art. 52, § 1 (1993). "Everyone shall have the right to compensation by the state for the damage caused by unlawful actions or inaction of state organs, or their officials." *Id.* art. 53.

37. See FOWLER VINCENT HARPER, A TREATISE ON THE LAW OF TORTS § 2 (1933).

38. See David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781, 804-05. Punitive damages originated in England, where their purpose was to punish those

fendants in wrongful death actions motivate businesses to devise safer practices to avoid future liability.

Because the burden of proof in a civil system is lower than in criminal trials and civil law imposes only financial penalties, civil sanctions must be severe to deter effectively.³⁹ To deter future tortious actions, monetary sanctions must at minimum outweigh the benefits of maintaining the status quo.⁴⁰

Russian courts do not award punitive damages to plaintiffs in wrongful death cases.⁴¹ There are no exceptions to this rule, nor does the Russian Civil Code state the policy reasons for it.⁴² It likely exists because large punitive damage awards would stifle the Russian economy.⁴³

Punitive damages are not necessary to achieve deterrence and could result in over-deterrence, bankrupting both private and governmental organizations in the process. Therefore, the *Duma* is justifiably apprehensive of legislation that may harm the growth of business.⁴⁴

IV. CONTINUED REFORM OF RUSSIA'S WRONGFUL DEATH STATUTE

A. *Life is Dangerous in Russia*

Russia's current economic conditions necessitate a revised approach toward civil recovery. Because of the political and social upheaval accompanying the dissolution of the Soviet Union, the Russian economy has been stagnant, resulting in poorly main-

who were beyond the criminal law's reach. *See id.* at 794.

39. *See id.* at 805.

40. *See id.* at 797.

41. *See generally* GK RF (Russ.). Russia's Code provides for moral damages (those which include mental pain and suffering) but no provision exists for punitive damages in negligence cases involving death, even if the defendant is a governmental entity. *See id.*

42. *See generally* GK RF (Russ.).

43. *See generally* George L. Bustin & Andrei V. Krylov, *Product Liability in Emerging Markets: The Russian Model*, 9 INT'L L. PRAC. 20 (1996). Product liability law in Russia does not provide for punitive damages either, despite the fact that many potential defendants are foreign corporations with deep pockets. *See id.* at 21. This is a strong statement about the aversion of Russian law to punitive damages.

44. *See* Daniel McGrory, *Civilizing the Russian Underground Economy: Requirements and Prospects for Establishing a Civil Economy in Russia*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 65, 67 (1995). McGrory asserts that much of the Russian economy exists "underground" and beyond the reach of regulation. *See id.* at 90. He believes this further weakens the legitimate economy. *See id.*

tained roads, public transportation systems and public utilities.⁴⁵

In 1995, passengers boarding Russian trolleys were electrocuted because corroded power cables allowed electricity to flow through the hand rails.⁴⁶ Rather than repair the cables, the Russian government advised citizens to jump on and off the trains, landing on both feet, to avoid electrocution.⁴⁷ In another instance, a manhole adjacent to a playground was left uncovered by street workers and a five year-old boy fell into it and drowned.⁴⁸ In June of 1997, bribed Russian inspectors approved a shipment of bootlegged vodka that killed twenty-two people who drank it.⁴⁹

Severe winters compound Russia's problems. Ice accumulated on buildings must be removed to prevent it from falling on passers-by, as it did in the case of Lyudmila Rolshchikova. To melt ice, authorities spread a toxic mixture of chloride salt on the streets that corrodes underground power lines and pollutes ground water.⁵⁰

This state of affairs is not limited to the public sector; private enterprise is similarly unmaintained.⁵¹ Automobiles often stall in high-speed traffic lanes, causing fatal collisions.⁵² Construction sites are not properly safeguarded and falling debris rains down on sidewalks.⁵³ Russia is a dangerous place to live, and its citizens are not financially protected from the consequences of frequent fatal accidents.

45. See Paddock, *supra* note 1, at A9. The overall state of Russian public maintenance is atrocious, and is punctuated by the Russian Street Authority spreading toxic road salt to melt ice. *See id.* In one incident, a Russian utility erroneously connected a high pressure gas line to a residential line, causing fifteen homes to explode in a small village in the north. *See id.* Also, tap water provided by the Russian utility company is frequently contaminated, causing widespread illness and occasionally death. *See id.* In 1997 in just one month, 394 people contracted hepatitis from municipal tap water. *See id.*

46. *See id.* There is evidence that the corrosion of the power cables did not occur due to age or wear but rather as a result of the road salt that the Russian Transportation Authority uses to melt ice. *See id.*

47. *See id.*

48. See Howard Witt, *Street Tells Stories of Chaos in Moscow*, NEW ORLEANS TIMES-PICAYUNE, Mar. 6, 1994, at A27. This is merely one example of the sort of outrageous negligence which would warrant an award of punitive damages under an American-style damage system. *See infra* Part VI.

49. See Paddock, *supra* note 1, at A9.

50. *See id.*

51. *See id.* This toxic mixture was the likely cause of the trolley electrocutions because it corroded the underground wires that powered the cars. *See id.*

52. *See id.*

53. *See id.*

B. Russian Insurance is Scarce and Expensive

One reason to protect Russian citizens from catastrophic death is the unavailability of private insurance.⁵⁴ Russians find liability and life insurance difficult to obtain, and few individuals can afford the premiums.⁵⁵ Because the Russian government began with the vestiges of the Communist national insurance system, there are few statutory provisions regulating private insurance.⁵⁶

New legislation is often more vague and difficult to interpret than the laws it was meant to clarify.⁵⁷ Although there are many new private insurers willing to insure policyholders, they often charge exorbitant premiums or become insolvent.⁵⁸ As a result, few Russians carry insurance.⁵⁹

Russian companies and Russian drivers are generally uninsured.⁶⁰ Moreover, most Russians do not have life insurance.⁶¹ This emphasizes the need for a more comprehensive system of tort compensation. Russian children whose mothers are negligently killed cannot recuperate the costs of deadly accidents except through the legal system. Consequently, such accidents may leave behind a financially helpless family. Until the Russian economy can support a better private insurance system, Russian law must provide a more complete remedy.

C. Under the Russian Wrongful Death Statute a Survivor Must Be Under Eighteen, Elderly, or Disabled to Recover

Russian law allows adequate compensatory damages to survivors only when they are incapable of supporting themselves.⁶² The survivors must be minors, elderly, or disabled to receive this in-

54. See Christopher A. Thompson, *Insuring a Brighter Future: The Emerging System of Russian Insurance Law*, 19 HOUS. J. INT'L L. 863, 867 (1997). "Given the current state of the insurance industry, the introduction of additional legislation will be crucial to Russia's economic development." *Id.* at 866.

55. See *id.* at 867.

56. See *id.* at 867, 871.

57. See *id.*

58. See *id.* The newly formed insurance companies suffered from gross undercapitalization and widespread concerns regarding the financial stability of these companies developed. The government, however, reacted slowly. See *id.* at 866, 876.

59. See Thompson, *supra* note 54, at 911. The premiums collected by Russian insurers totaled less than \$1 billion dollars in 1996. See *id.* In the United States, by comparison, the total was about \$254 billion dollars. See *id.*

60. See Paddock, *supra* note 1, at A9.

61. See *id.*

62. GK RF § 1, chap. 40, art. 459 (Russ.).

creased compensation.⁶³

The harsh reality of this system is that a surviving spouse can be precluded from recovery merely because she was employed prior to her husband's death. Alternatively, she may be unable to find work for reasons not related to physical infirmity or age, but rather because of lack of job skills or a depressed economy. Unless she was completely dependent upon her husband, she can only recover burial expenses.⁶⁴

Prior to the 1996 amendment, a surviving child over eighteen years old was ineligible for compensation, even if the child was attending school at the time of the accident.⁶⁵ Notably, there is no exception to the new statute that allows recovery for a surviving student.⁶⁶

As a matter of public policy, a primary goal of any tort system should be to make victims and their families economically whole following a loss.⁶⁷ The current Russian system does not make tort victims whole, but only reimburses immediate costs.⁶⁸ Russia should strive to provide long term compensation for victims to spare Russian citizens costs that should be borne by tortfeasors.

Compensating survivors and encouraging the growth of business need not be mutually exclusive goals. Ensuring the financial stability of plaintiffs has broad positive effects on the economy.⁶⁹ Punitive damages would exacerbate economic downturns by passing tortfeasors' costs to consumers, further depressing the economy.⁷⁰

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See generally* 22A AM. JUR. 2d *Death* §§ 24-32 (1988).

68. Compensation for financial losses in Russia usually includes only the expenses immediately incurred following the death of a plaintiff-decedent, such as funeral and burial expenses. *See* Paddock, *supra* note 1, at A1. These were the only damages awarded prior to the 1994 amendment to the wrongful death statute. *See* Russian Resolution No. 3, *available in* LEXIS Intlaw Library, RF Law File. When lost wages are awarded, they are awarded only to relatives unable to earn a livelihood. Thus, to win lost wages, a plaintiff must not only show she deserves damages, but also that there is a financial need for those damages. *See* GK RF § 1, chap. 40, art. 459.

69. *See generally* Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385 (1987).

70. *See* Andrea K. Curcio, *Painful Publicity—An Alternative Punitive Damages Sanction*, 45 DEPAUL L. REV. 341, 354 (1996).

V. THE U.S. SYSTEM OF DAMAGE AWARDS

A. Public Policy Considerations of the U.S. System May Benefit the Russian System

In the United States, survivors can recover decedents' lost wages regardless of the age or physical condition of the survivors.⁷¹ This is consistent with the U.S. policy of ensuring financial wholeness regardless of the plaintiffs' reliance on the decedent.⁷² The U.S. system also provides compensation for emotional loss and other intangible losses in wrongful death cases.⁷³

B. The U.S. System and Its Policy Bases

The U.S. tort system awards punitive damages when the violation of the plaintiff's rights is particularly egregious.⁷⁴ The purpose of punitive damage awards has long been debated in American law; it has been described as a combination of compensation, deterrence and retribution rationales.⁷⁵ To determine the usefulness of punitive damages in Russia, their purpose and utility in the United States must first be examined.⁷⁶

1. Specific and General Deterrence

In the United States, punitive damage awards deter both specifically and generally.⁷⁷ Because U.S. business and industry is generally able to pay these large judgments, the policy of deter-

71. See 22A AM. JUR. 2d *Torts* §§ 89-157 (1988).

72. See generally *id.*

73. See *id.*

74. Note that states are split on the award of punitive damages in wrongful death actions, indicating the importance and divisiveness of the issue. California does not allow punitive damages in wrongful death actions. See *Cortez v. Macias*, 110 Cal. App. 3d 640, 167 Cal. Rptr. 905 (1980). Pennsylvania allows punitive damages for wrongful death. See *Wang v. Marziani*, 885 F. Supp. 74 (S.D.N.Y. 1995). New York also allows for punitive damages in wrongful death. See *Rimoldi v. Schanzer*, 537 N.Y.S.2d 541 (1989).

75. See Partlett, *supra* note 38, at 792.

76. Commentator Dorsey Ellis has proposed seven reasons for awarding punitive damages: (1) the punishment of the defendant; (2) the deterrence of the particular defendant (specific deterrence); (3) the deterrence of others (general deterrence); (4) the preservation of the peace; (5) the inducement of law enforcement by private citizens; (6) the compensation of the victim for otherwise uncompensable losses; and (7) the payment of the plaintiff's attorney's fees. See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982).

77. See Partlett, *supra* note 38, at 792. Specific deterrence refers to deterring tortfeasors who have already been found liable whereas general deterrence refers to deterring potential tortfeasors. See *id.*

rence results in a net long-term financial gain.⁷⁸

Commentators disagree, however, on whether negligence, which is by definition unintentional, can be deterred at all.⁷⁹ This argument is weak when applied to individuals,⁸⁰ but it becomes more viable when the level of individual culpability rises to recklessness.⁸¹

In the case of corporations,⁸² the argument for deterrence is more compelling.⁸³ The negligence of businesses is commonly the result of company policy, and is therefore deterrable. While the individual person may not consciously choose to be negligent, a corporation will often follow certain procedures that are likely to result in negligent conduct.

The following examples illustrate this point. In a common case of individual negligence, a distracted driver rear-ends another car. This may be caused by the driver's fatigue, poor concentration, old age, or other distractions. The driver is aware that paying attention to the road is beneficial to him as well as to others, yet he negligently fails to do so.

Next, reconsider the case of Lyudmila Rolshchikova, who was killed by falling ice. The city's failure to remove the ice was negligent, but it was likely caused by a conscious decision of the city's public works department.⁸⁴ Removing the ice may have been too costly because of a lack of manpower or equipment. The city should have known that failing to remove the accumulated ice was

78. This is the fundamental tenet of the public policy underlying a tort system. *See id.* Although the amounts of the judgments appear to be high, industry is financially coerced into developing more efficient business practices and means of production which result in lower consumer costs. In addition, as business becomes safer, fewer people are injured, resulting in a long-term net gain in resources.

79. *See generally* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994).

80. In other words, corporate negligence is more easily deterrable than individual negligence.

81. At the point when an individual gives conscious thought and recognition to a known danger and yet does nothing to avoid its occurrence, the individual could be successfully deterred if the negative consequences of that action outweigh any benefits that the would-be tortfeasor would accrue from performing the act. Prior to the moment when conscious thought drives the tortious behavior, the actor does not perform any cost-benefit analysis of his actions and therefore cannot be successfully deterred. *See generally* Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115 (1993).

82. Fictitious individuals.

83. *See* Curcio, *supra* note 70, at 347.

84. *See id.*

dangerous. Knowing that it would cost less to pay damages than to remove the ice, the city made a conscious decision not to act.

The behavior of the city public works department is not reckless because it did not consciously disregard a known danger.⁸⁵ The city *should have known* of the danger.⁸⁶ Although the city's culpability approached recklessness, the possibility of injury was not reasonably certain, making its behavior merely negligent.⁸⁷

While the negligent behavior of the individual driver cannot be deterred, the negligence of the public works department is deterrable.⁸⁸ If the department knows that the price of inaction will exceed the cost of action,⁸⁹ it will be motivated to avoid such penalties.

Under the current Russian system, not only will the department undercompensate the victims, a life will also be lost. This demonstrates why the goal of deterrence is more important than the goal of compensation. If deterrence is successfully implemented as a policy, it will not only compensate the victims more efficiently, but also prevent accidents and save lives.⁹⁰

2. Punitive Damages as Compensation for Otherwise Non-Compensable Losses

One commentator contends that punitive damages exist to compensate survivors for intangible and otherwise uncompensable losses.⁹¹ He reasons that although the courts award explicit damages for losses that are difficult to quantify,⁹² punitive damage

85. See 57A AM. JUR. 2d *Negligence* § 262 (1988).

86. See *id.* While negligence is the failure to use the care that a reasonable person under the same or similar circumstances would use, recklessness is the failure to act when the actor consciously realizes that an injury is probable. See *id.*

87. See Curcio, *supra* note 70, at 341.

88. See *id.*

89. The cost of action would include the costs of hiring additional maintenance workers and possibly acquiring more equipment. One might argue that the money is not available for such expenditures; but the cost of judgments would be more expensive. Judgments would be set at a level that tortfeasors could afford so that the plaintiffs would be able to collect.

90. See *id.*

91. This argument is unpersuasive in the United States because the system of torts in this country provides for virtually every describable form of damages, including emotional distress, loss of consortium, etc. The purpose of punitive damages in the United States is to punish the defendant and to provide general and specific deterrence. See generally 22A AM. JUR. 2d *Death* (1988).

92. An example of this would be loss of consortium or mental suffering.

awards compensate survivors for costs that are not allowed by law.⁹³

This argument does not explain the existence of punitive damages in the United States. U.S. courts award damages for pain and suffering that cover any possible psychological injuries that plaintiffs may suffer.⁹⁴

Attorneys have also been credited for increasing both the occurrence and amount of punitive damage awards because they are motivated to argue for them when working on contingency.⁹⁵ Although the historical reasons for punitive damages are debatable, they exist in the United States today both as punishment and deterrent.⁹⁶

3. Do Punitive Damages Offend the Ideology of Tort Law?

Commentators have argued that punitive damages are inconsistent with the U.S. justice system.⁹⁷ First, punitive damages inject punishment, a characteristic inherent in criminal law, into the civil system.⁹⁸ Civil law generally exists to compensate victims of non-criminal conduct, not to punish wrongdoers.⁹⁹

Second, punitive damages can leave defendants unable to pay future judgments to other equally deserving plaintiffs.¹⁰⁰ If a corporate defendant injures one person, other injured persons won't be able to recover because the first plaintiff will have depleted the funds. Subsequent plaintiffs have an equally compelling right to compensation, but they effectively lose that right by being beaten to the courthouse.¹⁰¹

One of the arguments against punitive damages, however, is also a strong argument in their favor: punitive damages *allow* civil law to punish behavior that does not merit punishment under

93. See Partlett, *supra* note 38, at 795.

94. See 22A AM. JUR. 2d *Death* §§ 234-240 (1988).

95. See Partlett, *supra* note 38, at 794.

96. See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived its Origins*, 37 VAND. L. REV. 1117, 1118 (1984).

97. See *id.*

98. See Partlett, *supra* note 38, at 793, 800.

99. See *id.* at 790.

100. See generally Sylvia M. Demarest & David E. Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, 18 ST. MARY'S L.J. 797 (1987).

101. See *id.* at 798.

criminal law.¹⁰²

A simple explanation for the apparent inconsistency is that civil law awards punitive damages because criminal law cannot.¹⁰³ That is to say, corporate or municipal defendants have the resources to pay out these sometimes staggering judgments, but defendants in criminal cases most often cannot.¹⁰⁴ Also, punitive damages may exist because corporate entities cannot be imprisoned, thereby permitting the increased punishment of a defendant who can only be sanctioned financially.

Rather than viewing civil law as intrusive on criminal law, civil law can be viewed as complementary to it. When the two systems operate in concert, they correct and deter more instances of inefficient behavior than either system alone.¹⁰⁵

VI. THE CORRECT DAMAGE FORMULA FOR RUSSIA

A. Deterrence Would Not Be Furthered by Punitive Damages

Deterrence is Russia's most important goal in its struggle to establish a system of compensation that serves public policy purposes. However, the Russian economy prevents the institution of punitive damages to achieve that end.

Punitive damages would not further general deterrence in Russia because they could not be consistently applied or awarded in sufficiently large amounts. Punitive damages could effect specific deterrence,¹⁰⁶ but would also bring the danger of over-deterrence.¹⁰⁷

Punitive damages would also not effectively compensate victims for intangible or non-compensable losses. Although some plaintiffs would benefit, many more would lose an opportunity to collect a judgment because the Russian economy cannot support numerous claims against business and industry.¹⁰⁸ Future plaintiffs would find that no one is accountable for losses sustained, and they would remain uncompensated.

102. *See id.* at 800.

103. *See id.*

104. *See id.*

105. *See id.*

106. *See generally* McGrory, *supra* note 44.

107. *See id.*

108. *See generally* James P. Nehf, *Empowering the Russian Consumer in a Market Economy*, 14 MICH. J. INT'L L. 739 (1993).

Justifying punitive damages as a means of awarding attorney fees to the plaintiff likewise fails. While greater punitive damage awards would motivate lawyers to try cases which they otherwise would not, such awards will also financially drain Russian industry. Plaintiffs may benefit from a few large damage awards, but eventually the well would run dry and leave plaintiffs *and* defendants without financial resources.¹⁰⁹

In the case of the trolley electrocutions, it is possible that mere compensatory damages, even to the families of the several victims, would not be sufficient to outweigh the cost of repairing the damaged power cables.¹¹⁰ In such a case, punitive damages might appear necessary to motivate action on the part of the government. Considering the number of possible plaintiffs in such a case, however, the collective amount of mere compensatory damages rises dramatically. Compensatory damages alone in these multiple plaintiff cases will more likely affect the defendant than in cases with single plaintiffs.

B. Russia Should Not Adopt the U.S. System of Punitive Damages

Russia was correct in passing its lost future wages statute. It did not go far enough, however, either in compensating victims or deterring tortfeasors.

By limiting damage awards to survivors who are unable to care for themselves, Russians are worse off financially by bearing the additional burden of destitute survivors. Although families might assume their care, those without family become burdens on the state.¹¹¹ Society bears the cost instead of the responsible party. Tortfeasors escape with minimal expense.

Another reason why punitive damage awards are high in the United States is that corporations with significant capital cannot be deterred by smaller damage amounts.¹¹² Awards must be high to inflict tangible financial punishment on the corporations. This is not true in Russia.

The ideal solution for Russia is a middle ground between the damages currently awarded and the sizable judgments sometimes won by plaintiffs in the United States. This balance would consist

109. See generally McGrory, *supra* note 44.

110. See Paddock, *supra* note 1, at A1.

111. See KONST. RF art. 7, § 2 (1993). The Russian Constitution provides that the government will care for elderly and disabled citizens. See *id.*

112. See Demarest & Jones, *supra* note 100, at 822.

of awarding lost wages to all family members who depended even partially on the decedent, regardless of their age or health. Only by increasing compensatory damage awards to plaintiffs can the Russian legal system achieve all its goals: compensation, deterrence, and the preservation of the Russian economy.

1. Potential Effects of Judicial Activism on Punitive Damage Awards

There are over 15,000 judges in Russia today.¹¹³ If Russia institutes punitive damage awards on a discretionary basis, damage amounts would be inconsistent.¹¹⁴ This is distinct from judicial activism, which results from a lack of cohesiveness in the judiciary.¹¹⁵

A jury system would provide increased consistency in judgment amounts.¹¹⁶ Juries do not weigh competing considerations of policy, but rather consider only what the instant parties deserve.¹¹⁷ This suggests that similar cases will result in similar outcomes.

This is not true when a single individual, like a judge, is responsible for decisions within a single jurisdiction over a period of time.¹¹⁸ Individual viewpoints tend to create jurisprudence that differs from other jurisdictions.¹¹⁹ Allowing judges to award discretionary punitive damages would result in inconsistent application of the law, and create different results where the outcomes should have been similar.¹²⁰

113. See Murphy, *supra* note 12, at 3. Russian President Boris Yeltsin has signed into law a bill which would make all Russian judges federal judges. It is hoped that this will create unity within the Russian judiciary because separatism threatens to undermine the authority of the federal government. See *id.* at 2.

114. There have been many signs of judicial independence among the various districts in the past, prompting President Yeltsin to sign a bill into law unifying the Russian judicial system. See *id.* at 5. There are currently 14,650 judges sitting in the civil courts of general jurisdiction. This represents an 8% departure from the overall size of the general jurisdiction court system if all seats were filled. See *id.* The mere fact that so many benches are empty is startling evidence of the state of morale among judges throughout the nation. They have little confidence in the federal system, and the lack of pay contributes to the difficulty of filling these posts. See *id.*

115. See *id.*

116. See generally Lisa M. Sharkey, Comment, *Judge or Jury: Who Should Assess Punitive Damages?*, 64 U. CIN. L. REV. 1089 (1996).

117. See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1140 (1992).

118. See Sharkey, *supra* note 116, at 1089.

119. See *id.* at 1090.

120. See *id.* at 1089.

Because of this variety of results, the goals of punitive damages would be ill-served.¹²¹ Greater uncertainty of damage awards and consequently lower contingent legal fees will decrease attorney motivation to take cases.¹²²

Inconsistent verdicts also compromise the goals of general and specific deterrence. Potential tortfeasors may be tempted to gamble with safety if they are somewhat less likely to be punished if caught. Defendants will be deterred to a lesser extent if the punishment imposed is less than expected.

Finally, particular judges might consistently award lower damage amounts than others. Plaintiffs instead of defendants will be deterred from filing cases because of uncertain results.

C. Russia Should Not Adopt a Modified Form of Punitive Damages Limited By a Statutory Cap

The absence of civil jury trials in Russia might favor Russia's adoption of a system of punitive damages.¹²³ Russia has recently passed legislation providing for jury trials in death penalty cases.¹²⁴ Judges alone preside over civil trials, which are unaffected by this legislation.¹²⁵

This argument is unpersuasive, however, because any level of punitive damage awards would harm the Russian economy. Without juries, the Russian courts can adopt a system of punitive damages with a statutory cap that would not jeopardize the vitality of the Russian economy. This cap could be set at a predetermined percentage of the compensatory damages that include lost wages.

This system, although seemingly rigid in setting damage amounts, is actually flexible because the statutory cap can be adjusted to account for a growing economy and the need for greater

121. See *id.* at 1091.

122. While the family will be better off with a small damage award than with nothing at all, cases would have to be handled on a pro-bono basis to avoid the ethical dilemma that would arise from deducting a contingent fee from a judgment that would be a family's only sustenance.

123. See Concept of Judicial Reform Act, No. 1435 (1991).

124. See *id.* The Russian law reinstates the trial by jury in criminal trials in which death is a possible penalty. The jury consists of two members of the citizenry who occupy a semi-permanent position in the chambers of the same judge throughout their tenure. See *id.* Preliminary data from Russia indicates that these two jurors are in most cases a mere rubber stamp for the decision of the judge, who makes a recommendation that the jury must approve. See Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61, 67 (1995).

125. See Concept of Judicial Reform Act, No. 1435 (1991).

financial incentives to deter businesses. With the statutory cap, awards are strictly regulated and fears of arresting the development of the economy are allayed.

This system is not as arbitrary as judge or jury punitive damage awards because it allows awards to be proportional to the amount of compensatory damages awarded. The punishment of the defendant would correspond precisely to the amount of harm done, and eliminate the inconsistency that is inherent in jurors and leads to large verdicts.¹²⁶

The statutory cap fails, however, because it does not deter either generally or specifically, and is also inherently unfair to plaintiffs. Punitive damages exist first and foremost to punish the defendant, not to compensate the plaintiff. Therefore, the loss of a limitless punitive damages system¹²⁷ hampers justice and benefits negligent defendants. The plaintiffs who would be the hardest hit by a statutory cap on punitive damages are those who have suffered from the most egregious and unforgivable sorts of injuries—those that result from the defendant's blatant disregard for the plaintiff's rights.¹²⁸ The statutory cap is therefore a less efficient solution than awarding no punitive damages at all.

Another fear is the inconsistent application of a discretionary punitive damage award with a statutory cap.¹²⁹ The statutory cap suffers the same problem with judicial discretion as do any other discretionary damages. Inconsistent application would result in a system not far removed from the status quo, and policy goals would be ill-served. This would further narrow the gap between the present system and the statutory cap by reducing the amounts of damage awards overall.

Ultimately, the strongest argument against a statutory cap on punitive damages is simply that punitive damages are undesirable in Russia because compensatory damages alone sufficiently deter, punish, and preserve the integrity of the Russian economy.

126. See Clermont & Eisenberg, *supra* note 117, at 1140. This is the commonly advanced explanation for why jury verdicts are higher on average than those awarded from the bench.

127. Such a plan stands in contrast to a statutorily regulated system.

128. See Troy L. Cady, Note, *Disadvantaging the Disadvantaged: The Discriminatory Effects of Punitive Damage Caps*, 25 HOFSTRA L. REV. 1005, 1009 (1997).

129. For a discussion of judicial activism in Russia, see *supra* Part VI.B.1.

D. A Solution For Russia

By awarding more comprehensive compensatory damages to survivors regardless of their age or physical infirmities, Russia can effectively balance its policy considerations. Lesser compensation will negatively affect the Russian economy, not only by leaving financially dependent persons helpless, but by leaving business and municipal organizations without financial incentives to correct their dangerous conduct. An amendment to the Russian Civil Code providing for lost wage awards without exception in wrongful death actions would achieve this change in the law.

Punitive damages, by contrast, would result in over-deterrence because any sizable judgment would likely bankrupt a defendant. They might arguably deter others from the same behavior, but the punishment would be too severe and detrimental to the overall economic condition. In addition, actors may be deterred from useful activity because of the severity of any potential punishment.¹³⁰

The absence of punitive damages does not diminish the plaintiffs' potential overall compensation. Punitive damages exist not for the purpose of compensating plaintiffs but rather to deter and punish defendants.¹³¹

Few restraints would exist on the frequency of punitive damage awards in Russia. Undoubtedly, some judges might attempt to diminish the awards as a result of economic foresight, but judicial activism is unlikely in Russia.¹³² Judges have little incentive to act inconsistently with statutory law because of the risk of losing their already meager salaries.¹³³

In addition, there are many cases where the behavior of tortfeasors shows such a complete disregard for the safety of employ-

130. This is the classic case of over-deterrence, where the financial punishment for certain acts has been made too severe. See Curcio, *supra* note 70, at 347-48.

131. See Sales & Cole, *supra* note 96, at 1124. An original purpose of punitive damages may have been to compensate plaintiffs for otherwise non-compensable costs, such as mental anguish and attorney fees. Because the law provides for mental damages today and because attorney fees are most often taken on contingency in cases where punitive damages against manufacturers or industry are likely to be won, punitive damages no longer serve those purposes. See *id.* at 1120-24.

132. See Murphy, *supra* note 12, at 6. Murphy suggests that there are two types of judges in Russia: those who are corrupt and those who are lovers of justice. See *id.* Unfortunately, Murphy finds that both these kinds of judges are less than competent. Both these problems stem from the fact that judges are underpaid, and the positions fail to attract those who are most qualified. See *id.*

133. See *id.*

ees and the public that it would be a miscarriage of justice not to award punitive damages if they were provided for by law.¹³⁴

An excellent example is again the case of the trolley electrocutions, in which the government was not only aware of the dangerous condition and the deaths which had resulted from it, but even issued a warning to passengers not to touch the hand rails.¹³⁵ Although the replacement of the trolley wires would be expensive, many aged or disabled persons who are likely to rely on public transportation do not possess the physical agility necessary to jump on and off trains.

The outrageousness of this act by the government would be a plaintiff's boon in the United States. The Russian government, however, could not afford to satisfy a large punitive judgment without causing hardship to those who rely on government assistance.¹³⁶ A number of such suits could devastate the Russian federal budget.¹³⁷

VII. CONCLUSION

The ideal balance between victims' rights to compensation and the protection of Russian business is to award survivors full economic compensation for lost wages while abstaining from punitive damages. If damages awarded exceed the amount of actual damages incurred, the growth of the Russian economy would be unnecessarily compromised. If plaintiffs are denied recovery because they are not aged or disabled, they are denied the right to compensation explicit in the Russian Constitution.¹³⁸

Although Russian plaintiffs might benefit from punitive damage provisions, those benefits would be short-lived. The absence of juries in civil trials will reduce the average amount of awards and thereby protect the economy. A statutory cap on punitive damages appears viable, but its operation would be inherently unjust to the most deserving plaintiffs. Discretionary awards by

134. The following cases, for example, would be appropriate for the application of a punitive damage rule: the cases of the trolley electrocutions, the case of the open manhole next to the playground, the public utility cases where pressurized gas caused explosions, and the tainted tap water cases.

135. See Paddock, *supra* note 1, at A9.

136. See generally Nehf, *supra* note 108, at 750. Nehf advances a similar rationale regarding consumer protection from defective goods.

137. See Murphy, *supra* note 12, at 3.

138. See KONST. RF art. 53 (1993). The right to compensation exists when injuries are caused by government action. See *id.*

judges would prove too inconsistent to achieve the desired policy outcomes of plaintiff compensation and increased attorney involvement. The best solution is to award more liberal compensatory damages to compensate plaintiffs, punish defendants, and achieve deterrence.

In Russia, smaller damage amounts can effectively deter businesses that are still growing, and can thus be deterred by lower damage amounts than U.S. companies. Consequently, the goal of deterrence will be better served by adequate compensatory damages than by punitive damages.¹³⁹

*Dominic J. Messiha**

139. See *Adams v. Murakami*, 54 Cal. 3d 105, 110 (1991).

The essential question . . . in every case must be whether the amount of damages awarded substantially serves the societal interest. . . . "Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. . . . By the same token, . . . the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." . . . "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective."

Id. (citations omitted).

* J.D. Candidate, Loyola Law School, 1999; B.A. University of California, Los Angeles, 1995. I thank my mother and father for instilling in me the importance of education and for supporting me through mine.

